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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*

v.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Panhandle Eastern Pipe Line Company (Panhandle), Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 25, 1959.

OPINIONS BELOW

The memorandum opinion of the District Court is unreported as of the present time and is printed in the

Appendix to this petition. (App. 5a)[1] The opinion of the Court of Appeals is unreported as of the present time and is printed in the Appendix to this petition. (App. 1a).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit (App. 5a) was entered on May 25, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Whether 28 U. S. C. § 1292(b) is the exclusive method of review of orders on motions for transfer.

(2) Whether 28 U. S. C. § 1292(b) limits the availability of review by mandamus proceedings under 28 U. S. C. § 1651(a) of orders on motions for transfer.

(3) Whether the right to a fair jury trial is comprehended within the standard "interest of justice" as used in 28 U. S. C. § 1404(a) so that a district judge must consider an asserted denial of that right in ruling on a motion for transfer.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1292(b), 72 Stat. 1770 (Act of September 2, 1958); 28 U.S.C. § 1651(a), 63 Stat. 102 (All Writs Act); and 28 U.S.C. § 1404(a), 62 Stat. 937. They are printed in the Appendix to this petition at page 12a.

STATEMENT OF THE CASE

On February 12, 1958, Michigan Consolidated Gas Company (Consolidated), a Michigan corporation, with

[1] "App." references are to the Appendix following this petition.

its principal place of business in Detroit, Michigan, filed, as Cause No. 17-703, its complaint (R. 28)[2] in the United States District Court for the Eastern District of Michigan, Southern Division, against Panhandle, a Delaware corporation, with its principal operating offices and place of business in Kansas City, Missouri. Consolidated claimed that jurisdiction was vested in the District Court under 28 U.S.C. § 1337 and 15 U.S.C. § 717, *et seq.*, particularly § 717(u). Consolidated's complaint alleged that by reason of Panhandle's refusal over a period of more than six years to sell gas to Consolidated, which the latter alleged it had a right to purchase under a tariff imposed by the Federal Power Commission, Consolidated had sustained damages amounting to seventeen million dollars.

Motion for Change of Venue Filed by Panhandle

On March 17, 1958, Panhandle filed its Motion for Change of Venue pursuant to 28 U.S.C. § 1404(a) (R. 36) alleging that for the convenience of parties and witnesses and in the interest of justice the cause should be transferred to the United States District Court for the Western District of Missouri, Western Division. In support of its motion, Panhandle submitted affidavits executed by its officers (R. 39) together with a large supporting exhibit consisting mainly of reproductions of news articles and editorials from the principal newspapers published and circulated in the Eastern District of Michigan (Volume II, Transcript of Record).[3] On April 23, 1958, Panhandle filed its re-

[2] "R." references are to the printed transcript of the record, nine copies of which are filed with this petition.

[3] The newspaper articles contained in Volume II of the Record filed with this Court have not been printed but are reproduced in substantially the same form as presented to the District Court and Court of Appeals.

quest for jury trial of the cause. (R. 56) Consolidated filed an answer to Panhandle's Motion for Change of Venue (R. 56), and after the filing of briefs oral argument on said motion was held September 29, 1958. (R. 100) Thereafter Panhandle filed a Supplemental Memorandum on October 22, 1958. (R. 140)

The Opinion and Order of the District Court

The District Court denied Panhandle's motion by an order entered April 14, 1959 (App. 11a), in accordance with a memorandum opinion of April 6, 1959. (App. 5a)

In his opinion, the District Court concluded that the matters involved in the newspaper reports submitted as an exhibit (R. Vol. II) to Panhandle's Motion for Change of Venue are not related to the cause of action now pending before him in any way that would give the readers of such reports a predisposition on any issue there presented. (App. 9a) The District Court stated that the appearance of such articles in local newspapers over a period of years could not possibly produce a population of citizens in the affected area who are "all personally prejudiced" against Panhandle. (App. 9a) The District Court concluded that the over-all picture presented was not one that redounded to the prejudice of Panhandle. (App. 9a)

Panhandle had argued that, even though prospective jurors in a trial of this case were not Consolidated customers, nevertheless the systematic and widespread campaign of newspaper abuse carried on over many years had in fact created such an inimical predisposition in such jurors as to make a fair trial unlikely. The District Court rejected this argument on the ground that at most only those persons who were con-

cerned with prices charged by Consolidated might be prejudiced.

The District Court held that traditional standards of "locus" were applicable in considering the question of transfer and that measured by such standards the action is properly in Michigan. (App. 8a) Referring to Panhandle's showing that the convenience of the parties and witnesses required that the case be transferred, the District Court concluded that, to the extent Panhandle would be served by a transfer based upon convenience of parties and witnesses, Consolidated would be proportionately disserved. (App. 7a) In so holding, the District Court either overlooked, or disregarded, Panhandle's offer to pay the cost of transporting Consolidated witnesses to Kansas City, Missouri, in the event the case were transferred. (R. 137)

Opinion of the Court of Appeals

Following the denial by the District Court of its Motion for Change of Venue, Panhandle then filed, on April 28, 1959, in the Court of Appeals for the Sixth Circuit, its Petition for a Writ of Mandamus to the District Court directing him to vacate his order of April 14, 1959, and to enter an order transferring the cause to the Western District of Missouri, Western Division. (R. 2) Jurisdiction was founded on 28 U.S.C. § 1651(a). Panhandle alleged that the District Court was guilty of an abuse of discretion in that the decision was clearly erroneous in the following particulars: *First*, the court held as a matter of law that the interest of justice concept, as used in 28 U.S.C. § 1404(a), did not comprehend the right to a fair jury trial where the petitioner could not show that *all* of the potential jurors were infected with bias and prejudice.

(App. 9a) *Second*, the court held as a matter of law that because no clear showing had been made that the potential jurors had a preconceived opinion prejudicial to the petitioner on the precise issues of the case to be tried, petitioner was not entitled to a change of venue. (App. 9a) *Third*, the court held that a party seeking transfer cannot, by paying the expenses of the other party occasioned by the transfer, thereby obtain a transfer where the convenience of parties and witnesses is otherwise balanced. *Fourth*, the court improperly adopted the standard of "locus," a doctrine of the conflict of laws, as one of the factors to be considered in determining whether or not a motion to transfer should be granted. (App. 8a)

The Court of Appeals denied Panhandle's Petition for Writ of Mandamus by its order of May 25, 1959. (App. 5a) The accompanying opinion (App. 1a) handed down on that date contained a condensed recital of the facts and listed some of the reasons given by Panhandle as to why the case should have been transferred. No further consideration was given to the questions raised by the Petition for Mandamus. The court merely stated that petitioner's contentions had been considered in the opinion of the District Court. (App. 3a)

The court discussed at some length the nature of remedies by extraordinary writs and adopted by reference its holding in *Allstate Ins. Co. v. U.S. Dist. Ct. for E.D. of Michigan*, 264 F. 2d 38 (6th Cir. 1959), to the effect that, since petitioner had made no showing that it had sought relief under the Act of September 2, 1958, 72 Stat. 1770, 28 U.S.C. § 1292(b), no relief would be provided by issuance of a writ of mandamus.

The court, in apparent amplification of this holding, went on to discuss the standards which it now believes control its exercise of the power granted it under 28 U.S.C. § 1651(a) to issue such extraordinary writs. It concluded that in light of the enactment of Section 1292(b) and the restrictions imposed by this Court's opinion in *Ex Parte Fahey*, 332 U.S. 258 (1946), and in *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379 (1953), the present case was not a proper case in which the power should be exercised.

ARGUMENT

The decisions of the Court of Appeals and the District Court raise important questions concerning the proper administration of the federal judicial system. Their effect has been not only to becloud the proper method of review of rulings on motions to transfer under 28 U.S.C. § 1404(a), but, in the instant case, substantially to deny the petitioner the right to a fair jury trial. This case presents to this Court its first opportunity to interpret and clarify the scope of 28 U.S.C. § 1292(b), for the future guidance of parties in civil proceedings in all of the federal courts. In addition, a consideration of this cause will permit this Court to resolve the numerous conflicts presently existing among the circuit courts of appeals as to the propriety of the use of the extraordinary writ of mandamus as a method of reviewing orders issued pursuant to 28 U.S.C. § 1404(a), and, if such remedy is found to be appropriate, to clarify the standards by which the courts of appeals are to control the discretion of the district courts.

Whether Section 1292(b) is the Exclusive Method of Review of Orders on Motions for Transfer

The Court of Appeals held here that, since no showing had been made by petitioner that it had availed itself of the procedure provided by 28 U.S.C. § 1292(b), petitioner had failed to disclose any extraordinary circumstances justifying issuance of a writ of mandamus to review the order of the District Court denying transfer. The only conclusion which can be drawn from the court's holding is that it believes review of orders on motions for transfer, if available at all, can only be obtained under Section 1292(b) and not under Section 1651(a). Although the present case is certainly one of major importance involving as it does a prayer for seventeen million dollars, it does not meet the requirements for review under Section 1292(b). The conclusion of the Court of Appeals to the contrary is clearly erroneous. This decision squarely presents the problem, hitherto not ruled upon by this Court, of the relationship between the extraordinary writs authorized under Section 1651(a) and appeals under Section 1292(b).

The legislative history of Section 1292(b) indicates that Congress intended that it should be closely circumscribed, and that interlocutory appeals were not to be used in litigation in which the issues raised could be otherwise properly disposed of.[4] Causes relating to the transfer of actions where it is claimed that the transfer is not authorized by law, in so far as they involve the issues of jurisdiction or venue in the transferee court,[5] were regarded as properly appealable un-

[4] See House of Representatives Report No. 1667, 85 Cong. 2nd Sess.; Senate Report No. 2434, 85 Cong. 2nd Sess.

[5] See *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185 (E.D. La. 1958); *Orzulak* v. *Federal Commerce & Navigation Co.*, 168 F. Supp. 15 (E.D. Pa. 1958).

der the new statute. *House Report No. 1667, 85 Cong., 2nd Sess., pp. 1 and 2.* There is no indication, however, that Congress believed that Section 1292(b) was an appropriate vehicle to review any other orders relating to the transfer of an action.

Consistent with the restrictive application of the statute intended by Congress, the courts of appeals which have construed Section 1292(b) uniformly have held that the statute is to be strictly construed and applied only to those cases falling squarely within its terms. *Milbert* v. *Bison Laboratories*, 260 F.2d 431 (3rd Cir. 1958); *In re Heddendorf*, 263 F.2d 887 (1st Cir. 1959); *Oskoian* v. *Canuel*, 264 F.2d 591 (1st Cir. 1959); *United States* v. *Woodbury*, 263 F.2d 784 (9th Cir. 1959).

The question of the availability of an appeal authorized by Section 1292(b) of an order under Section 1404(a) was raised *sua sponte* by the Court of Appeals for the Fifth Circuit in *Ex Parte Deepwater Exploration Company*, 260 F.2d 546 (5th Cir. 1958). There, petitioner filed an application for leave to file a petition for writ of mandamus to review an order of the district court granting a transfer under Section 1404(a). The Court of Appeals remanded the case to the district court for consideration of whether an interlocutory appeal under Section 1292(b) was available. In an able opinion, *Deepwater Exploration* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185 (E.D. La. 1958), the district court found that there was no controlling question of law involved within the meaning of Section 1292(b) because the balancing of conveniences required by Section 1404(a) was a matter of fact and because the transferee court clearly had jurisdiction. The lower

court further found that the appeal would not materially advance the ultimate termination of the litigation. Thereupon, the Court of Appeals granted the motion for leave to file the petition for mandamus (260 F.2d 546, (5th Cir. 1958)).

The conclusion seems inescapable that the denial of a motion to transfer where there is no question of jurisdiction or venue either in the transferee or transferor courts does not present the sort of case in which the findings required by Section 1292(b) could properly be made.

The present decision of the Court of Appeals for the Sixth Circuit departs from the *Dalquaffer Exploration Company* cases by its outright denial of the right to mandamus proceedings in circumstances in which it was quite clear that interlocutory appeal under Section 1292(b) was not available. The language of the court in *Allstate Insurance Co.* v. *U.S. District Court*, 264 F.2d 38 (6th Cir. 1959), at page 39, adopted by reference in the present opinion of the Court of Appeals for the Sixth Circuit, makes this conclusion clear.

> "We find it unnecessary to consider at this time the correctness of the ruling of the District Court. * * *"

[6] The court did not consider the requirement of Section 1292(b) that the original order contain the necessary findings and that the appellant must file a motion for leave to appeal within ten days after the entry of the order. Meeting these requirements has been held jurisdictional. *Milbert* v. *Bison Laboratories*, 260 F. 2d 431 (3rd Cir. 1958); *In re Heddendorf*, 263 F. 2d 887 (1st Cir. 1959). In the instant case no certificate was made by the District Court. The Court of Appeals for the Sixth Circuit did not remand the case for such findings or suggest such remand is appropriate under Section 1292(b).

> "Petitioner makes no showing of having sought relief under the Act of September 2, 1958, 72 Stat. 1770, Sec. 1292(b), Title 28 U. S. Code. We find no such extraordinary circumstances here existing which would justify the issuance of the writ of mandamus sought by petitioner. * * *"

The present holding established a different standard for consideration of petitions for mandamus than has been adopted by any other court of appeals. The Court of Appeals for the Fifth Circuit has held that notwithstanding that an order cannot be appealed under Section 1292(b), it is nevertheless subject to review by way of mandamus. Thus, the Fifth Circuit holds that Section 1292(b) has not eliminated mandamus for the review of orders on motions for transfer. In conflict with the Fifth Circuit the Court of Appeals here has held that Section 1292(b) has destroyed the hitherto unquestioned power of review of such orders by mandamus. Obviously, in view of the apparent conflict between circuits, the question of the impact of Section 1292(b) on the availability of mandamus as an avenue for reviewing order on motions for transfer is one which this Court should resolve now so that courts of appeals and litigants may be governed accordingly.

Whether Section 1292(b) Limits the Availability of Mandamus for Review of Motions for Transfer

It is clear from the foregoing that the Court of Appeals for the Sixth Circuit determined Panhandle's *only* avenue of review of the District Court's denial of Panhandle's motion for transfer was under the interlocutory appeal procedure of Section 1292(b). Yet this Court has *not* held that mandamus is an improper

remedy to review a motion for transfer. In fact, this Court has refused to rule that mandamus is not a proper remedy in such a case. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955). But, if it be argued that the Court of Appeals did not completely abdicate its power to review motions to transfer by mandamus proceedings, its opinion falls victim to a second fatal error.

The Court of Appeals held in effect that the availability of mandamus for reviewing motions for transfer and the standards for that review depend solely upon the method and procedure by which the question is presented. The Court has confused the question whether it should consider the merits of a petition for writ of mandamus with the question whether the writ should issue. In doing so it created a set of multiple standards to govern both determinations. The result is the present erroneous and unwarranted decision. Thus, if the district court had made the findings required by Section 1292(b), the Court of Appeals would, if it granted leave to appeal, consider that appeal as it would any other. It would ascertain whether the court below had erred in making conclusions of law and whether the findings of fact were supported by sufficient evidence. Had the petitioner unsuccessfully requested the district court to make findings under Section 1292(b), the Court of Appeals presumably would permit review by mandamus and apply the standards enumerated in *Lemon* v. *Druffel*, 253 F.2d 680 (6th Cir. 1958). It would ascertain whether the court below had made erroneous conclusions of law and whether its ruling was, on the whole, "clearly erroneous." *In re Josephson*, 218 F.2d 174 (1st Cir. 1954); *Ford Motor Co.* v. *Ryan*, 182 F.2d 329 (2d Cir. 1950). But, where the petitioner did not request the

findings required by Section 1292(b), even though to have requested them would have been in vain and such findings were not made, the Court of Appeals will either refuse to consider the matter altogether or will, if the case is not the amorphous "really extraordinary cause," ascertain only whether the lower court "considered" the contentions of the petitioner.

Here the Court of Appeals, calling into play the novel third standard based upon failure to seek relief under Section 1292(b), erroneously refused to issue the writ of mandamus requested by Panhandle. The effect of the application of this third standard is to attach undue weight to the phrase "clear abuse of discretion." That standard should not represent, and certainly was never intended to represent, a perfunctory procedure to give rubber-stamp approval to the actions of the lower courts. In applying the third standard, the Court of Appeals was satisfied to observe that the lower court had considered the "contentions" of Panhandle. But "consideration" alone does not discharge the discretionary duty of the district court on a motion for change of venue. The lower court must consider a motion for transfer and it must exercise proper discretion in that consideration. In the present case, the Court of Appeals construes these two elements to be one, and summarily concludes that the consideration of Panhandle's "contentions" *is* the exercise of proper discretion which insulates the action of the lower court from scrutiny by the Court of Appeals.

The erroneous decision of the Court of Appeals for the Sixth Circuit in the present case compounds the confusion already existing among the several courts of

appeals concerning the scope and method of review for transfer orders under Section 1404(a).[7] A careful examination of the conflicting decisions indicates that not only do the courts of appeals require different procedures but, in effect, that the multiplicity of procedures has produced the application of different standards of the correctness of the lower court rulings on the motions to transfer.

The number of cases cited below illustrates the fact that the correctness of rulings on motions for transfer is a matter frequently before the courts. Likewise, the contrariety of rulings on the procedures to be used and the standards to be applied indicates a clear need for definitive determinations by this Court, not only of the availibility of the remedy of mandamus vis-à-vis the appeal procedures prescribed by Section 1292(b) but of the standards, if any, to be applied in reviewing such rulings.

Petitioner submits that it has been injured by the unwarranted and unprecedented multiple standard employed in this case for the first time. Because appeal under Section 1292(b) was not available, the

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[7] Compare the procedures and standards used in the following cases involving review of transfer orders under Section 1404(a): *All States' Freight* v. *Modarelli*, 196 F. 2d 1010 (3rd Cir. 1952); *Clayton* v. *Warlick*, 232 F. 2d 699 (4th Cir. 1956); *Great Northern Railway Company* v. *Hyde*, 238 F. 2d 852 (8th Cir. 1956), 245 F. 2d 537 (8th Cir. 1957); *In re Josephson*, 218 F. 2d 174 (1st Cir. 1954); *Ex Parte Chas. Pfizer & Co.*, 225 F. 2d 720 (5th Cir. 1955); *Ex Parte Pharma Craft Corporation*, 236 F. 2d 911 (5th Cir. 1956); *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329 (2nd Cir. 1950); *Torres* v. *Walsh*, 221 F. 2d 319 (2nd Cir. 1955); *Wiren* v. *Laws*, 194 F. 2d 873 (D.C. Cir. 1951); *Chicago, R.I. & P. Co.* v. *Igoe*, 212 F. 2d 378 (7th Cir. 1954), 220 F. 2d 299 (7th Cir. 1955); *Blaski* v. *Hoffman*, 260 F. 2d 317 (7th Cir. 1958), *cert. granted sub. nom.*, *Hoffman* v. *Blaski*, 79 S. Ct. 583 (1959).

Court of Appeals should not have applied a standard which imposed a greater burden on petitioner than the court would have imposed had the petitioner done a useless act.

The Effect of the Decision Below is to Deny Panhandle the Right to a Fair Jury Trial

The instant case brings to this Court the question as to whether or not the words "in the interest of justice" used in Section 1404(a) are to be construed to comprehend the right to a fair jury trial. This question has never been considered by this Court nor any court of appeals except in this case. Lower courts which have dealt with this question have uniformly held that the phrase does operate to insure the right to a fair trial. See, e.g., *Kirk* v. *Spur Distributing Co.*, 95 F. Supp. 428 (D.C. Del. 1950); *United States* v. *Erie Basin Metal Products Co.*, 79 F. Supp. 880 (D.C. Md. 1938) (Rule 21 (b), Fed. R. Crim. P.) The effect of the Court of Appeals' approval of the opinion of the District Court is to determine that the words, "interest of justice," used in Section 1404(a) do not comprehend the right to a fair jury trial.

Panhandle's motion for transfer was bottomed on the three factors of Section 1404(a): convenience of parties, convenience of witnesses, and the interest of justice. On the question of convenience of the parties and witnesses, petitioner submits that, in view of the showing made in the affidavits filed in support of Panhandle's motion, the District Court committed clear error in concluding that these grounds did not justify the requested transfer. This is particularly true in view of Panhandle's offer to pay the expenses of Consolidated's witnesses to come to and remain in the

Western District of Missouri upon the trial of the case pending before him.

The greatest force of Panhandle's motion for transfer stems from the showing that it cannot obtain a fair jury trial of the lower court action within the Eastern District of Michigan. In support of this position, Panhandle submitted an exhibit consisting mainly of newspaper articles taken from the major newspapers published in the Detroit area and circulated throughout the Eastern District of Michigan (R., Vol. II). These articles delineate the bitter controversies in which Panhandle and Consolidated have been engaged during the past several years, and they amply demonstrate the unfailing ability of Consolidated to enlist and obtain the active and partisan support of its position in these controversies by high public officials of various state, municipal, and other governmental bodies. Even a cursory reading of such articles conclusively demonstrates the widespread hostility which has been created against Panhandle in the area. Despite this showing and the statements in the affidavits submitted in support of Panhandle's motion the District Court determined not to grant the transfer. In effect, the opinion of the District Court stated the burden of Panhandle to be a showing that *all* of the population of the affected area must be personally prejudiced, for he stated in his opinion (App. 9a):

> "* * * To say that the appearance of these articles in the local newspapers over a period of years necessarily, or even possibly, would produce a population of citizens in the affected area *who are all personally prejudiced* against defendant because of an indoctrinated belief that Panhandle's success in this litigation would mean personal doom to them, is to indulge in fantasy. This is not

> the 'interest of justice' concept that was intended to be furthered by § 1404(a). * * *" (Emphasis supplied.)

Such a showing is, of course, a manifest impossibility. No court could realistically require such a showing and give anything other than mere lip service to the interest of justice concept contained in Section 1404(a). Further, the last sentence of the above quoted material indicates that the District Court believed that the words, "interest of justice," used in Section 1404 (a) did not comprehend the right to a fair jury trial. This holding, petitioner submits, is clearly erroneous. Even assuming that the District Court believed that conceivably a showing could be made which would warrant a transfer to insure a fair jury trial, it is clear from his opinion that he believed the showing would have to be that potential jurors had a preconceived opinion prejudicial to Panhandle on the precise issues of the case to be tried. This, too, is an impossible burden for Panhandle or any other litigant to discharge.

A case should be transferred without waiting to ascertain by examination of the talesman whether there is specific or unanimous prejudice against a party when it is shown that the party may, or probably will, be drawn into a trial by a jury under an influence of which they may themselves be hardly conscious, an influence which perhaps no human sagacity can detect, an influence carefully created by many years of propaganda disseminated by the newspapers of the area. *Delaney v. United States*, 199 F.2d 107 (1st Cir. 1952); *United States v. Florio*, 13 F.R.D. 296 (S.D. N.Y. 1952); *Jacob v. Town of Oyster Bay*, 104

N.Y. Supp. 275 (1907). The federal courts should be quick to transfer a case when there is the slightest possibility that such instinct prejudice may influence the outcome. Justice requires no less.

The standard for which Panhandle contends is also the standard applied in many cases in the state courts. These cases are persuasive precedents in the federal courts on this point for the reason that in many of such cases the state courts were interpreting language in their own change of venue statutes identical with the language contained in Section 1404(a). See, e.g., *Rios v. Lacey Trucking Co.*, 123 Cal. App. 2d 865, 268 P.2d 160 (1959); *Mayor and Council of Hoboken v. Griffin*, 97 N.J.L. 16, 116 Atl. 712 (1922); *Jacob v. Town of Oyster Bay*, 104 N.Y. Supp. 275 (1907).

The language of the District Court can have no other meaning but that he does not believe "the interest of justice" concept of Section 1404(a) was intended to be applied to the showing and request of Panhandle in the present case. This is an erroneous construction of Section 1404(a) which, together with the other errors of the District Court, the Court of Appeals permitted to stand. It should be corrected by this Court. The interrelation of the right to a fair jury trial and the "interest of justice" of Section 1404(a) constitutes a new question never considered by this Court.

CONCLUSION

The instant case, growing out of a pending action for damages in the amount of seventeen million dollars, presents important questions heretofore undecided by this Court. There is involved the question of whether or not 28 U.S.C. § 1292(b) is the *exclusive* remedy by

which interlocutory orders, including rulings on motions for transfer under Section 1404(a), are to be reviewed, and, if Section 1292(b) is not the exclusive remedy, what is to be the relationship of Section 1292(b) to the availibility of the extraordinary writs authorized by Section 1651(a).

Also presented for review is the question of whether or not Section 1404(a) is to be construed so as to comprehend the right to a fair jury trial.

Petitioner urges that these questions have been erroneously decided by the Court of Appeals and that the orderly administration of the federal judicial process requires their review and final determination by this Court. For these reasons, Panhandle prays that a writ of certiorari issued to the United States Court of Appeals for the Sixth Circuit, to review its judgment in this case.

Respectfully submitted,

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APPENDIX

(Filed, May 25, 1959, Carl W. Reuss, Clerk)

No. 13,870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, *Respondent*.

On Petition for Writ of Mandamus

Decided May 25, 1959.

Before: MARTIN, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. Michigan Consolidated Gas Company (hereinafter referred to as Consolidated), a Michigan corporation, with its principal place of business in Detroit, Michigan, filed a complaint in the United States District Court for the Eastern District of Michigan, Southern Division, against Panhandle Eastern Pipe Line Company (hereinafter referred to as Panhandle), a Delaware corporation, with its principal operating offices and place of business in Kansas City, Missouri. Consolidated's complaint alleged that by reason of Panhandle's refusal over a period of more than six years to

sell gas to Consolidated, which it allegedly had a right to purchase under certain orders of the Federal Power Commission, Consolidated had sustained damages amounting to $17,000,000.00.

Panhandle filed a motion for change of venue pursuant to Sec. 1404 (a), Title 28, U. S. Code, alleging that for the convenience of parties and witnesses and in the interest of justice the case should be transferred to the United States District Court for the Western District of Missouri, Western Division. Panhandle also filed a request for a jury trial. After oral argument and the consideration of briefs filed by the respective parties, the District Judge, by order of April 14, 1959, denied the motion for change of venue. He also handed down a Memorandum Opinion which discussed the question and stated the reasons for the ruling.

On April 28, 1959, Panhandle filed in this Court its petition that a writ of mandamus be issued by this Court (1) directing the District Judge to vacate the order of April 14, 1959, and (2) directing the District Judge to enter an order transferring said case from the United States District Court for the Eastern District of Michigan, Southern Division, to the United States District Court for the Western District of Missouri, Western Division. It states that during the past twenty years it has been involved in numerous controversies with Consolidated which have been contested bitterly before the state and federal courts of Michigan, the Federal Power Commission, the Michigan Public Service Commission, the Common Council of the City of Detroit, and other comparable governing bodies of nearby communities, that in nearly all of these disputes Consolidated has sought and obtained from time to time the active and partisan support of its more than 800,000 customers, as well as the support of various public officials of the state, cities, counties, and other surrounding communities, that the three principal newspapers of the City

of Detroit, as well as newspapers of other smaller nearby communities, have consistently opposed Panhandle and supported Consolidated in its efforts to vilify and discredit Panhandle in the public mind and to defeat it in the legitimate conduct of its business, and that by reason of the resulting bias, prejudice and general hostility toward Panhandle in the minds of a vast majority of the population of the Eastern District of Michigan, it can not obtain a fair trial before an impartial and unbiased jury of that district. Numerous exhibits were filed in support of this contention. Panhandle also contends that the convenience of parties and witnesses will be better served by a trial of this case in the Western District of Missouri, where most of the voluminous records which will be used in the trial of this case are located, than in the Eastern District of Michigan. These contentions had the consideration of the District Judge and were discussed in his Memorandum Opinion in connection with the order herein complained of.

On the general question of the use of the writ of mandamus to review interlocutory orders of the District Court, without regard to Sec. 1404 (a), Title 28, U. S. Code, the United States Supreme Court stated in *Ex Parte Fahey*, 332 U. S. 258, "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes." See also: *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26. This Court has recently followed these rulings and denied mandamus in cases in which the petitioner sought to review the District Court's ruling on a question of jurisdiction. *Massey-Harris-Ferguson, Ltd.* v. *Boyd*, 242 F. (2) 800, C. A. 6th, cert. denied, 355 U. S. 806; *Allstate Insurance Co.* v. *United States District Court, etc.*, 264 F. (2) 38, C. A. 6th. Although the question of venue is different from the question of jurisdiction, the issues involved in the two types of cases are similar when a review of the District Court's

ruling is sought through a writ of mandamus. In the *Allstate Insurance Company* case we also pointed out that the petitioner had made no showing of having sought relief under the Act of September 2, 1958, 72 Stat. 1770, Sec. 1292 (b), Title 28, U. S. Code. Those rulings are applicable to the present case.

This Court has also recently considered the use of a writ of mandamus to review a ruling of the District Court on a motion for change of venue under Sec. 1404 (a), Title 28, U. S. Code. *Lemon* v. *Druffel*, 253 F. (2) 680, C. A. 6th, cert. denied, 358 U.S. 821. In that case we discussed the question at some length and pointed out that although the Court has the power to review by mandamus proceedings a ruling under Sec. 1404 (a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power. See also: *In Re Josephson*, 218 F. (2) 174, C. A. 1st, wherein after thoroughly discussing the question, the Court said (at page 183), "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of the interlocutory ruling. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, supra, 332 U. S. 258.

The application for writ of mandamus is denied.

Order Denying Application for Writ of Mandamus

(Filed May 25, 1959)

The application for Writ of Mandamus is denied.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan corporation, *Plaintiff*,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation, *Defendant*.

Civil Action No. 17703

Memorandum Opinion

The Court has before it defendant's motion for change of venue from the Eastern District of Michigan, Southern Division (Detroit) to the Western District of Missouri, Western Division (Kansas City). This is an action for damages allegedly sustained by plaintiff because of defendant's failure to sell its natural gas to plaintiff. It is alleged in the complaint that defendant's conduct has been in violation of its own tariff schedule, and of the Natural Gas Act. A jury trial has been demanded by defendant. It will be seen that the thrust of defendant's argument stems from the existence of its jury demand. Without it, the motion is deprived of all force.

Our first consideration is, of course, that of jurisdiction. The complaint, paragraph 3, sets forth the following:

> "3. Jurisdiction is vested in this Court for the following reasons:
>
> (a) The action arises under an Act of Congress regulating commerce, (Title 28 U.S.C. § 1337) to-wit: The Natural Gas Act (Title 15 U.S.C. § 717, *et seq.*)

(b) The Natural Gas Act by its terms confers jurisdiction. (Title 15 U.S.C. § 717u)"

The defendant has not put in issue the question of jurisdiction, and the Court finds and concludes that it has jurisdiction of the parties and of the subject matter. Such a determination is not to be confused with the question of venue which *has* been put in issue by defendant. A recent opinion points out that there have been some erroneous concepts in regard to the distinction. Carter v. American Bus Lines, 169 F.Supp. 460 (1959). The motion for change of venue has been brought pursuant to 28 USCA § 1404(a), which reads as follows:

> "'§ 1404 (a). For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been bought."

There is no contention made by defendant that the action has been improperly brought here. Defendant has been admitted to do business in the state of Michigan and it, in fact, does business here. No issue of improper service is made. Plaintiff is a Michigan corporation with its principal place of business in this district, and with its entire business operations within the state of Michigan. Its offices, officials and business records are all kept and maintained here. There is no aspect of abnormality in the choice of forum in this instance by the plaintiff. It is as natural as one can imagine. Defendant advances many of the same reasons practicality-wise for desiring the transfer to its base of operations as we have set forth in pointing up the normaley of plaintiff's choice of forum. In the light of 1404(a) we recognize that we must take into consideration 3 factors in making a determination of the pending motion. Defendant stated this at the oral hearing. Defendant, speaking through its attorney, said:

> "But we have much, much more to sustain this motion than the question of the convenience of the parties

and the convenience of witnesses. We have the interest of justice. That is what I want to address myself chiefly to this morning.

"That phrase has been unanimously construed by the courts dealing with it as comprehending the cornerstone of our common law tradition—the right of a litigant to a fair and impartial trial before a jury untainted by prejudice and unexposed to improper and undue influence.

"I say to your Honor with great sincerity that we feel that, on the record made here, Panhandle has shown that it cannot obtain a fair jury trial in this jurisdiction.

"Panhandle has been bringing gas into Michigan for about twenty years, and throughout that period there has been, against Panhandle, conducted by Michigan Consolidated and others, a well-conceived, cunningly-devised and excellently-executed, plan to inflame the public mind against Panhandle. That campaign has been carried on incessantly, almost day by day, and certainly week by week, and month by month, with the help of the newspapers; of public bodies, such as the Chamber of Commerce; of public officials, from the Governor of the State down, including the United States Senators and United States Congressmen; the State officials; and any number of officials of cities, towns, villages, and townships in this State." (Transcript, Sept. 29, 1958, pp. 5-6.)

This then is the thrust of defendant's argument, that because of alleged prejudice on the part of the jurors-to-be, the "interest of justice" requires that there be a change of venue. This is a reason in a non-practical area and we shall deal with it after a summary disposition of the practical considerations. In relation to the convenience of parties and to the convenience of witnesses, it is the Court's opinion that a transfer is not proper. If the convenience of defendant would be better served by such transfer, it would be proportionally disserved from the viewpoint of plaintiff. It might also be noted that the area with which

the lawsuit is concerned is this area, not Kansas City. The damages here sought for failure to sell to Consolidated relate to natural gas that allegedly should have been available for consumption in this area, not in Kansas City. Therefore, by all traditional standards of "locus" (place where the tort occurred, place where contract was made or was to be performed) this action is properly in Michigan. From the pleadings, affidavits, exhibits and argument before the Court, the Court is of the opinion that the convenience of the parties and the convenience of the witnesses would not be better served by the requested transfer.

We now reach the contention of defendant that an impartial jury would not be available in this District and Division. Defendant has filed herein a document of substantial bulk entitled "Exhibit to Affidavit of Frederick H. Robinson filed in Support of Defendant's Motion for Change of Venue dated March 12, 1958." It consists of approximately 123 pages. Each page contains a process copy of one or more items from newspapers in the Detroit area. For convenience we will refer to each item as a clipping. The contents of the clippings are variable in length. Some are complete articles. Some are small news items of a few lines. Some appear in the editorial column. Each clipping deals with one or both parties present in this litigation and or with subject matter involving one or both. The 3 major Detroit dailies are represented, as well as local papers of suburban and nearby non-suburban areas. The period of time encompassed by the clippings commences with the year 1952. The latest year to appear is 1958. A brief filed subsequent to the hearing of this motion contains a clipping (copy) from a Detroit newspaper dated October 17, 1958. It is, therefore, quite apparent that the business of defendant in this area is one which the local newspapers deem to be of public interest. More than a few of the clippings contain matter whose source is stated to be that of the mayor of a nearby municipality whose

reputation for fiery words is well known in this entire area. Many of the clippings set forth the contentions of the two parties to the particular feud in progress at the time the newspapers carried the account set forth. A reading of this exhibit followed by some reflection on it does not present quite the picture outlined so graphically by defendant's counsel. The reportorial writings do no more than indicate the views of the parties involved in each of the particular controversies as they have arisen over the last seven or eight years. The matters involved in the newspaper reports are not related to the instant cause of action in any way that would give readers a predisposition on any issue here present. As a matter of fact, in view of the absence of an answer from defendant, it is not now even possible to know that there is any factual question here present. The complaint sets forth allegations as to violations of tariff schedules and of the Natural Gas Act. These allegations may possibly reduce themselves to questions of law. In this posture of the case we can only state that such a possibility does not appear to be remote.

The over-all picture, as gleaned by the Court from its viewing of the clippings Exhibit, is not one that redounds to the prejudice of defendant. There are uncomplimentary remarks about each participant in the various incidents related in the clippings. To say that the appearance of these articles in the local newspapers over a period of years necessarily, or even possibly, would produce a population of citizens in the affected area who are all personally prejudiced against defendant because of an indoctrinated belief that Panhandle's success in this litigation would mean personal doom to them, is to indulge in fantasy. This is not the "interest of justice" concept that was intended to be furthered by § 1404(a). It should be noted that the population of metropolitan Detroit*, as of the City's 1956 estimate, is 3,670,000; that the Eastern District, Southern Division,

* Wayne, Oakland and Macomb Counties.

embraces 11 counties with a total population of 4,162,700 (July, 1957). Many of the counties are not served by plaintiff. The population of such counties would, therefore, be in no position to be personally concerned with the price charged by Consolidated for consumers' gas. There is no prohibition against calling jurors from such counties.

In the event it should develope that the possibility of prejudice existed, the Court could easily consider empanelling jurors from areas certain to be immune from alleged contamination by the local press, because of their freedom from personal impact from the ups and downs of the litigious maneuvers, both legally and administratively, of the parties presently before the Court.

The case will remain here, and an appropriate order may be presented.

Dated at Detroit, Michigan, this 6th day of April, A. D. 1959.

THOMAS P. THORNTON
United States District Judge

A TRUE COPY
JOHN J. GINTHER, *Clerk*
By s/ KATHLEEN FARNSWORTH
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan corporation, *Plaintiff*,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation, *Defendant*.

Civil Action No. 17-703

Order Denying Motion for Change of Venue

At a session of said Court held in the Federal Building in the City of Detroit, Michigan, this 14th day of April, 1959.

PRESENT: HON. THOMAS P. THORNTON, *District Judge*

This matter having come on to be heard upon the Motion of defendant for an Order transferring the venue of this action from this Court to the District Court of the United States for the Western District of Missouri, Western Division; and the Court having duly considered said Motion together with the pleadings, affidavits, and exhibits, the argument before the Court, and the briefs filed by the parties; and the Court, being fully advised in the premises, having on April 6, 1959, filed its Memorandum Opinion that said Motion should be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Motion of defendant for an Order transferring the venue of this action from this Court to the

District Court of the United States for the Western District of Missouri, Western Division is hereby denied.

THOMAS P. THORNTON
District Judge

As to form,
Approved for entry:

BODMAN, LONGLEY, BOGLE, ARMSTRONG & DAHLING
Attorneys for Panhandle Eastern Pipe Line Co.
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Detroit 26, Michigan

A TRUE COPY
JOHN J. GINTHER, *Clerk*

By s KATHLEEN FARNSWORTH
Deputy Clerk

STATUTES INVOLVED

The pertinent provisions of Title 28, U. S. Code, are set forth herein as follows:

Section 1292(a). "The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

Section 1292(b). "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district

court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Section 1401(a). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 1651(a). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

FILE COPY

Office-Supreme Court, U.S.
FILED
JUL 27 1959
JAMES R. BROWNING, Clerk

In The

Supreme Court of the United States

OCTOBER TERM, 1958

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

vs.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division,
Respondent.

No. 148

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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In The

Supreme Court of the United States

OCTOBER TERM, 1958

PANHANDLE EASTERN PIPE LINE COMPANY,
Petitioner,

vs.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division,
Respondent.

No. .....

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

The Honorable Thomas P. Thornton, United States District Judge, Respondent herein, respectfully requests that the Petition for Writ of Certiorari heretofore filed in this matter be denied.

QUESTION PRESENTED

Whether the District Judge so clearly abused his discretion as to require the issuance of a writ of mandamus against him when he denied defendant's motion for change of venue pursuant to 28 U.S.C. Section 1404(a),[1] finding as

[1] Set forth in full in the Appendix to the petition filed herein, at page 14a, and hereinafter cited as "Section 1404(a)."

facts that the convenience of parties and witnesses would not be better served by the requested transfer and that defendant had shown no such prejudice against it on the part of potential jurors as to require the transfer in the interest of justice.

STATEMENT OF THE CASE

On February 12, 1958, Michigan Consolidated Gas Company (Consolidated) filed its complaint (R. 28)[2] in this cause in the United States District Court for the Eastern District of Michigan, Southern Division, at Detroit. Consolidated seeks to recover damages from the defendant, Panhandle Eastern Pipe Line Company (Panhandle) by reason of Panhandle's refusal to sell natural gas to Consolidated in violation of the terms of Panhandle's tariff and in violation of the Natural Gas Act.

Panhandle has filed no answer, but on March 17, 1958, it filed its motion for change of venue (R. 36) pursuant to Section 1404(a), alleging that for the convenience of the parties and witnesses and in the interest of justice, the cause should be transferred to the United States District Court for the Western District of Missouri, Western Division, at Kansas City. Consolidated filed an answer to Panhandle's motion (R. 56). Affidavits (R. 39, 46, 50, 52, 61), an exhibit (R. Vol. II) and briefs were filed (R. 64, 75, 140) and oral argument held (R. 100).

In the briefs filed in its behalf (R. 80-86) and in oral argument (R. 101-102), Panhandle contended that it would be more convenient for it to try the case in Kansas City because it would otherwise be required to transport witnesses and records from Kansas City to Detroit. Consolidated argued that it would suffer equal or greater inconvenience in transporting witnesses and records from

[2] "R." references are to the printed transcript of the record, filed with the petition.

Detroit to Kansas City if the motion were granted (R. 65-72, 124-128).

Panhandle also filed an exhibit (R. Vol. II) consisting of 123 pages of reproduced clippings from newspapers published in Detroit and vicinity between 1952 and 1958. Based on this exhibit its counsel argued to the District Court as follows:

> "I say to your Honor with great sincerity that we feel that, on the record made here, Panhandle has shown that it cannot obtain a fair jury trial in this jurisdiction." (R. 103)

The Opinion of the District Court

The District Judge considered the motion, the pleadings, the affidavits and exhibit, the argument before the Court and the briefs filed by the parties, and on April 6, 1959, filed his Memorandum Opinion (App. 5a).[3] The opinion dealt first with the question of convenience of parties and witnesses and stated (App. 6a-8a):

> "Plaintiff is a Michigan corporation with its principal place of business in this district, and with its entire business operations within the state of Michigan. Its offices, officials and business records are all kept and maintained here. There is no aspect of abnormality in the choice of forum in this instance by the plaintiff. It is as natural as one can imagine. Defendant advances many of the same reasons, practicality-wise, for desiring the transfer to its base of operations as we have set forth in pointing up the normalcy of plaintiff's choice of forum. ***In relation to the convenience of parties and to the convenience of witnesses, it is the Court's opinion that a transfer is not proper. If the convenience of defendant would be better served by such transfer it would be proportionally disserved from the viewpoint of plaintiff. It might also be noted that the area

[3] "App." references are to the Appendix following the petition filed herein

with which the lawsuit is concerned is this area, not Kansas City. The damages here sought for failure to sell to Consolidated relate to natural gas that allegedly should have been available for consumption in this area, not in Kansas City. Therefore, by all traditional standards of 'locus' (place where the tort occurred, place where contract was made or was to be performed) this action is properly in Michigan. From the pleadings, affidavits, exhibits and argument before the Court, the Court is of the opinion that the convenience of the parties and the convenience of the witnesses would not be better served by the requested transfer."

The District Judge then turned to Panhandle's claim that it could not obtain a fair jury trial in the Eastern District of Michigan, Southern Division, and that the interest of justice therefore required a change of venue. Considering the newspaper clippings exhibit upon which this claim was based, the Court stated (App. 9a-10a):

"A reading of this exhibit followed by some reflection on it does not present quite the picture outlined so graphically by defendant's counsel. The reportorial writings do no more than indicate the views of the parties involved in each of the particular controversies as they have arisen over the last seven or eight years. The matters involved in the newspaper reports are not related to the instant cause of action in any way that would give readers a predisposition on any issue here present. ***

"The over-all picture, as gleaned by the Court from its viewing of the clippings Exhibit, is not one that redounds to the prejudice of defendant. There are uncomplimentary remarks about each participant in the various incidents related in the clippings. To say that the appearance of these articles in the local newspapers over a period of years necessarily, or even possibly, would produce a population of citizens in the affected area who are all personally prejudiced against defendant because of an indoc-

trinated belief that Panhandle's success in this litigation would mean personal doom to them, is to indulge in fantasy. This is not the 'interest of justice' concept that was intended to be furthered by §1404(a). It should be noted that the population of metropolitan Detroit, as of the City's 1956 estimate, is 3,670,000; that the Eastern District, Southern Division, embraces 11 counties, with a total population of 4,162,700 (July, 1957). Many of the counties are not served by plaintiff. The population of such counties would, therefore, be in no position to be personally concerned with the price charged by Consolidated for consumers' gas. There is no prohibition against calling jurors from such counties."

The Opinion of the Court of Appeals

Following the entry of the order of the District Court denying the motion (App. 11a), Panhandle filed in the Court of Appeals its petition for a writ of mandamus (R. 1) directing the District Judge to vacate said order and further directing him to enter an order transferring the cause to Kansas City. In its petition Panhandle again argued that it "cannot obtain a fair jury trial before an impartial and unbiased jury in the District Court for the Eastern District of Michigan" (R. 4); and argued that it had made "a preponderant showing that the convenience of parties and witnesses will be better served by a trial of this case in the Western District of Missouri, Western Division, than in the Eastern District of Michigan" (R. 6). It alleged a number of different respects in which it contended that the District Court "abused its discretion and committed error" (R. 8-11).

The Court of Appeals reviewed Panhandle's arguments and noted that "these contentions had the consideration of the District Judge and were discussed in his Memorandum Opinion in connection with the order herein complained of."

(App. 3a). The Court of Appeals cited the opinion of this Court in *Ex parte Fahey*, 332 U. S. 258, to the point that mandamus is a "drastic and extraordinary" remedy which should not be used as a substitute for an appeal, and that as an extraordinary remedy it should be "reserved for really extraordinary causes." (App. 3a).

The Court of Appeals stated that it had "recently considered the use of a writ of mandamus to review a ruling of the District Court on a motion for change of venue under Sec. 1404(a)" in *Lemon v. Druffel*, 253 F. 2d 680, C. A. 6th, cert. denied 358 U.S. 821 (App. 4a). The Court indicated that "in that case we discussed the question at some length and pointed out that although the Court has the power to review by mandamus proceedings a ruling under Sec. 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion of usurpation of judicial power."

The Court of Appeals concluded (App. 4a):

> "In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of an interlocutory ruling. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, 332 U.S. 258."

ARGUMENT

The only question actually presented for review is whether the District Judge so abused his discretion as to require the issuance of a writ of mandamus directing him to vacate his order. The Court of Appeals found no such abuse of discretion. Its ruling was correct.

The questions *argued* by petitioner *are not presented* by the opinions and orders below. The opinion of the Court of Appeals does not rule or even suggest that 28 U.S.C. Section 1292(b)[1] is the exclusive method of review of orders on motions for change of venue, or that it limits the availability of mandamus proceedings. Petitioner's claim that the District Judge held that Section 1404(a) does not comprehend the right to a fair jury trial is refuted by the fact that the major portion of the opinion of the District Judge was devoted to a careful consideration of the merits of Petitioner's assertion that it could not obtain a fair jury trial in the Eastern District of Michigan.

Petitioner asks this Court to bring before it for review hypothetical questions not presented by the record. Petitioner has made no showing of special or important reasons for review of the decision of the Court of Appeals which would justify the issuance of a writ of certiorari here. The petition should be denied.

I. The District Judge Did Not Abuse His Discretion

Contrary to the contentions of Petitioner, the only question actually presented by the record before this Court is whether the District Judge clearly abused his discretion in denying Petitioner's motion for change of venue.

What Petitioner really seeks is review of the merits of its claims that the convenience of the parties and witnesses require a change of venue and that it cannot obtain a fair

[1] Set forth in full in the Appendix to the petition filed herein at pp. 13a and 14a and hereinafter cited as "Section 1292(b)."

jury trial in the Eastern District of Michigan. Since these matters were clearly within the discretion of the District Court, its decision should not be disturbed unless that discretion was abused. The Court of Appeals reviewed the proceedings in the District Court and held that there had been no abuse of discretion which would justify the issuance of a writ of mandamus against the District Judge. Without further reviewing the facts, Respondent submits that the record clearly justifies the decisions below.

II. Petitioner's "Questions Presented" Are Not Presented By The Opinions and Orders Below

Petitioner seeks to conjure up conflict between the interlocutory appeal procedure newly provided by Section 1292(b) and the writ of mandamus of 28 U.S.C. Section 1651(a).[5] It also purports to find conflict between the decision of the Court of Appeals here and a ruling of the Court of Appeals for the Fifth Circuit (P. 8-11).[6]

A. The Court of Appeals did not hold that Section 1292(b) "destroyed the power of review by mandamus"

In a patent misinterpretation of the opinion of the Court of Appeals, the Petitioner states:

> "The only conclusion which can be drawn from the court's holding is that it believes review of orders on motions for transfer, if available at all, can only be obtained under Section 1292(b) and not under Section 1651(a). *** (P. 8)
>
> "***the Court of Appeals here has held that Section 1292(b) has destroyed the hitherto unquestioned power of review of such orders by mandamus." (P 11)

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[5] Set forth in full at App. 14a.

[6] "P." references are to the petition filed herein.

The only reference by the Court of Appeals to Section 1292(b), is made near the end of a paragraph in which it discusses generally the use of mandamus proceedings to review interlocutory orders of the District Court and cites *Allstate Insurance Company v. United States District Court, etc.*, 264 F. 2d 38, C.A. 6th, along with other authorities, as consistent with the following ruling of this Court in *Ex parte Fahey*, 332 U.S. 258:

> "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. *** We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies they are reserved for really extraordinary causes."

The Court then refers to Section 1292(b), saying:

> "In the *Allstate Insurance Company* case we also pointed out that the petitioner had made no showing of having sought relief under *** Section 1292(b) ***."

The *Allstate Insurance Company* case involved a petition for a writ of mandamus to vacate an order of a District Judge refusing to dismiss a cross-complaint for alleged lack of jurisdiction of the subject matter. In that case, as well as in the case at bar, the Court of Appeals relied upon the foregoing passage from *Ex parte Fahey*, supra. It did observe, as aforesaid, that the petitioner had made no showing of having sought relief under Section 1292(b). But the *ruling* in the *Allstate* case was as follows:

> "We find no such extraordinary circumstances here existing which would justify the issuance of the writ of mandamus sought by petitioner. *Massey-Harris-Ferguson, Ltd. v. Boyd*, supra." 264 F. 2d 39, 40.

In *Allstate*, as here, the Court of Appeals relied upon the rulings of this Court in *Ex parte Fahey*, 332 U. S. 258, and *Roche v. Evaporated Milk Assn.*, 319 U. S. 21, to the effect

that mandamus is an extraordinary remedy reserved for extraordinary causes.

We agree with Petitioner that the determination of its motion for change of venue involved only issues of fact, i.e. (1) balancing of convenience of parties and witnesses, and (2) whether an impartial jury could be empaneled out of the eleven counties comprising the Eastern District of Michigan, and that therefore the order of the District Court denying its motion was not within the purview of Section 1292(b).[7] (See P. 9-10). Had Petitioner so argued to the Court of Appeals, there would have been no occasion for the Court's comment on Section 1292(b). It could have been omitted without affecting the substance of the opinion.

But that is not the basis upon which this Petitioner presented its petition for a writ of mandamus to the Court of Appeals. On pages 5 and 6 of the petition filed in this Court there are recited the four assignments of alleged error upon which the petition for writ of mandamus was based. Each of the four separately enumerated assignments is alleged by the petition to be an erroneous ruling upon a controlling question of law. The first two of such assignments are labeled by the petition as erroneous rulings of law; the other two are inherently such.

Those allegations were a complete distortion of the ruling of the District Court but they were the basis for the petition for writ of mandamus. If true, the allegations might have brought the order of the District Court within the purview of Section 1292(b). In view of such allegations, it was certainly normal and proper for the Court of Appeals to comment that Petitioner had failed to seek the remedy provided by Section 1292(b) before resorting to the extraordinary remedy of mandamus.

Furthermore, and in direct contradiction of Petitioner's

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[7] Sec. 1292(b). "When a district judge * * * shall be of the opinion that such order involves a *controlling question of law* * * *"

statement (P. 11) that "the Court of Appeals here has held that Section 1292(b) has destroyed the hitherto unquestioned power of review of such orders by mandamus," the Court of Appeals cited its own recent decision in *Lemon v. Druffel*, 253 F. 2d 680, C.A. 6th, cert. denied 358 U. S. 821, and said:

> "In that case we discussed the question at some length and pointed out that although the court has the power to review by mandamus proceedings a ruling under Section 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power." (App. 4a)

B. The decisions of the Courts of Appeals for the Fifth and Sixth Circuits are not in conflict

A brief comment is in order with respect to the conflict alleged by Petitioner (P. 11) between the holding of the Fifth Circuit Court of Appeals in *Ex parte Deepwater Exploration Co.*, 260 F. 2d 546, and the ruling of the Court of Appeals for the Sixth Circuit in the instant case.

The rules of the Court of Appeals for the Fifth Circuit require a motion for leave to file a petition for writ of mandamus to be presented and granted by the Court of Appeals before the petition itself is filed. In the *Deepwater Exploration* case, the Court held that it "should not pass upon the said motion for leave so long as it is not clear and undisputable that there is no adequate remedy by appeal." 260 F. 2d 547. Accordingly, the Court postponed consideration of the motion for leave until the prospective petitioner had attempted to secure the certificate of the District Court provided by Section 1292(b). When the District Court refused its certificate (167 F. Supp. 185), the Court of Appeals granted the petitioner's motion for leave to file petition for writ of mandamus. However, it does not appear what action was taken in the *Deepwater Exploration* case

after consideration of the petition on the merits. See also *Watkins v. Watkins*, 260 F. 2d 548, C.A. 5th.

In the Court of Appeals for the Sixth Circuit the motion for leave to file the petition is not required. Title 28 U.S.C., Rules of Court of Appeals for Sixth Circuit, Rule 29.[8] Here Petitioner was permitted to file its petition and the petition was forthwith considered by the Court of Appeals and denied on its merits. The Court of Appeals simply noted in the course of its opinion (justifiably in view of the form of the petition) that the Petitioner had not previously sought relief under Section 1292(b).

While there are procedural differences between the two Circuits, there is no conflict between the rulings of the two Courts of Appeals. In both cases the Court *did* consider the petition for writ of mandamus on its merits. See also the ruling of the Ninth Circuit Court of Appeals in *Anderson v. McLaughlin*, 263 F. 2d 723, 725.

C. The Court of Appeals confirmed and followed the standards governing writs of mandamus announced by it in Lemon v. Druffel

In the second section of its argument (P. 11-15), the Petitioner seeks to confuse the standards applied by the Court of Appeals in denying the writ of mandamus. However, the Petitioner states with apparent approval:

> "Had the petitioner unsuccessfully requested the district court to make findings under Section 1292(b), the Court of Appeals presumably would permit review by mandamus and apply the standards

[8] Rule 29: "* * * Sec. 2. A party desiring to secure a writ of mandamus * * * shall file an original and three typewritten copies of his petition therefor setting forth the facts upon which he claims to be entitled to the writ which shall be sworn to and may be accompanied by such brief or memorandum as he may desire to submit. * * *

"Sec. 3. If the court is of opinion that the facts set forth in the petition justify a hearing, an order to show cause will be entered, returnable as promptly as the situation permits; if of contrary opinion, an order will be entered denying the petition."

enumerated in *Lemon v. Druffel*, 253 F. 2d 680." (P. 12)

That is, of course, precisely what the Court of Appeals did in the instant case. It permitted review by mandamus. It recited the standards enumerated in *Lemon v. Druffel* as follows:

> "In that case we discussed the question at some length and pointed out that although the court has the power to review by mandamus proceedings a ruling under Section 1404(a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power." (App. 4a)

And finally the Court of Appeals applied those standards and denied the petition for writ of mandamus on its merits, stating:

> "In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of the interlocutory ruling." (App. 4a)

III. The District Court Properly Ruled That Petitioner Can Obtain A Fair Jury Trial In The Eastern District of Michigan

In the third section of its argument (P. 15-18), Petitioner deals with the following question which it claims is presented for review:

> "(3) Whether the right to a fair jury trial is comprehended within the standard 'interest of justice' as used in 28 U. S. C. § 1404(a) so that a district judge must consider an asserted denial of that right in ruling on a motion for transfer." (P. 2)

In view of the fact that the District Judge did devote the major portion of his opinion to careful consideration of the merits of Petitioner's assertion that it could not obtain a fair jury trial in the Eastern District of Michigan, the imaginary nature of Petitioner's "Question Presented" is readily apparent.

What Petitioner actually seeks in this section of its argument is review of the merits of its claim that it cannot obtain a fair jury trial in the guise of a request for interpretation of Section 1404(a) (P. 15-16). Petitioner asks this Court to rule on the quantum and quality of prejudice which must be shown on the part of potential jurors to require a change of venue in the interest of justice (P. 18). Specifically, Petitioner suggests that "the Federal Courts should be quick to transfer a case where there is the slightest possibility that such instinct prejudice may influence the outcome" (P. 18). However, the District Judge found that Petitioner's showing did not even meet the standard for which it contends. In the District Judge's opinion, he stated:

> "The over-all picture *** is not one that redounds to the prejudice of defendant. *** In the event it should develop that the *possibility* of prejudice existed, the Court could easily consider empanelling jurors from areas certain to be immune from contamination by the local press, ***." (Emphasis supplied) (App. 9a)

The District Judge found as matters of fact that no prejudice had been shown presently to exist and that if the "*possibility of prejudice*" should later develop, adequate measures could be taken in the Eastern District of Michigan to insure Petitioner a fair jury trial. The Court of Appeals held that in so finding the District Judge had not abused his discretion.

The decisions below do not present important, unsettled questions of federal law. They present only the question

whether the District Judge abused his discretion in denying the Petitioner's motion. The petition here presents no reason for this Court to review or disturb the ruling of the Court of Appeals.

Summary

Petitioner has made no showing of clear abuse of discretion on the part of the District Court or on the part of the Court of Appeals. No conflict has been shown between the decision of the Court of Appeals here and the decision of other Courts of Appeals on the same subject matter. The questions of law which Petitioner has argued are not found in the record before this Court. The record here discloses no special or important reasons calling for the granting of review on writ of certiorari.

CONCLUSION

Wherefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

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